

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK

MAY 21 2008

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

In re the Marriage of:)	
)	
LUZ MARIA HELLMAN,)	2 CA-CV 2007-0141
)	DEPARTMENT B
Petitioner/Appellant,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 28, Rules of Civil
MARC RICHARD HELLMAN,)	Appellate Procedure
)	
Respondent/Appellee.)	
)	

APPEAL FROM THE SUPERIOR COURT OF MARICOPA COUNTY

Cause No. DR 2000-009537

Honorable J. Kenneth Mangum, Judge

AFFIRMED

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V Á S Q U E Z, Judge.

¶1 In this domestic relations action, Luz Maria Hellman appeals from the trial court’s order denying her request for attorney fees, costs, and other expenses related to the court-approved relocation of her minor child to Costa Rica, and denying her motion for new trial. For the following reasons, we affirm.

Facts and Procedural Background

¶2 We view the record in the light most favorable to upholding the trial court’s decision. *Little v. Little*, 193 Ariz. 518, ¶5, 975 P.2d 108, 110 (1999). Luz Maria Hellman and appellee Marc Richard Hellman divorced in 2000. The parties were awarded joint legal custody of their child, Matthew, with Luz as the primary residential parent. Luz subsequently remarried and in 2006 she informed Marc that she planned to move to Costa Rica with her husband and Matthew, who was then fourteen years old. Marc filed a motion “To Not Allow Mother to Take Child Out of Country,” claiming Matthew had expressed a desire to remain in Phoenix even if Luz were to move. Luz filed a response and cross-petition to permit relocation. Marc requested a “relocation evaluation,” and the parties stipulated to the court’s appointment of Dr. Joel Glassman to conduct “a full evaluation regarding custody and visitation.” Luz and Marc initially represented themselves. They had a number of discovery disputes that culminated in Luz’s filing of a motion for sanctions, in which she alleged Marc had “comprehensive[ly] and repeated[ly]” violated the rules of discovery. The court denied the motion.

¶3 Following a two-day evidentiary hearing, the court granted Luz’s petition to permit relocation and denied Marc’s motion to prevent her from moving. The court ordered

that Luz would be responsible for seventy-five percent of the expenses associated with Matthew's traveling between Phoenix and Costa Rica for the purpose of visiting his father. It further ordered each party to bear their own costs and attorney fees and equally share the costs of the custody evaluation prepared by Dr. Glassman.

¶4 Luz filed a motion for a new trial pursuant to Rule 83(A), Ariz. R. Fam. Law P., challenging the court's denial of her request for attorney fees and arguing the court also should have ordered Marc to pay the entire cost for the custody evaluation and to contribute seventy-five percent of Matthew's tuition expenses in Costa Rica. The court denied the motion and this appeal followed. We have jurisdiction pursuant to A.R.S. § 12-2101(B) and (F)(1).

Discussion

Attorney Fees

¶5 Luz first argues that the trial court abused its discretion by denying her request for attorney fees. Section 25-324(A), A.R.S., provides that a trial court "may order a party to pay a reasonable amount to the other party" for attorney fees and costs "after considering the financial resources of both parties and the reasonableness of the positions each party has taken throughout the proceedings." However, although a court may award such fees, it is not required to do so. *Alley v. Stevens*, 209 Ariz. 426, ¶ 12, 104 P.3d 157, 160 (App. 2004). We review a court's denial of a request for attorney fees pursuant to § 25-234 for an abuse of discretion, recognizing that the trial court had the opportunity to observe the conduct of the parties and review their financial records. *Graville v. Dodge*, 195 Ariz. 119,

¶ 56, 985 P.2d 604, 616 (App. 1999). A trial court abuses its discretion when it commits an error of law or otherwise exercises its discretion on untenable grounds. *See Fuentes v. Fuentes*, 209 Ariz. 51, ¶ 23, 97 P.3d 876, 881 (App. 2004); *Torres for and on Behalf of Torres v. N. Am. Van Lines, Inc.*, 135 Ariz. 35, 40, 658 P.2d 835, 840 (App. 1983).

¶ 6 Luz argues the trial court’s own findings established that Marc had “significantly greater financial resources” and that his conduct was “not reasonable.” Thus, she contends, she not only “qualified” for a fee award based on both criteria set forth in § 25-234, but in light of Marc’s “egregious” and “harmful” conduct, “[t]he statute leaves no room . . . [for the court] to deny fees.” We disagree.

¶ 7 The court’s findings do not support Luz’s position to the extent she claims. The court found Marc’s gross income for 2006 was approximately \$48,500, whereas Luz’s affidavit reflected her gross income was \$48,000 annually. And, Luz stated and the court noted that one of the benefits of moving to Costa Rica was that “[t]he family standard of living would improve.” Furthermore, Luz has not established that the parties’ income disparity was of such magnitude that we are required to find the trial court abused its discretion by not awarding fees. In the only Arizona case cited by Luz in which a trial court’s failure to award fees was reversed for an abuse of discretion, one party’s gross income was three times that of the other. *Burnette v. Bender*, 184 Ariz. 301, 306, 908 P.2d 1086, 1091 (App. 1995)¹; *see also Roden v. Roden*, 190 Ariz. 407, 412, 949 P.2d 67, 72

¹In *In re Marriage of Robinson and Thiel*, 201 Ariz. 328, ¶ 22, 35 P.3d 89, 96 (App. 2001), the other Arizona case Luz relies on in support of her argument, the court found no

(App. 1997) (abuse of discretion not to award fees where one party earned \$5.50 an hour and the other's annual salary was between \$90,000 and \$150,000). We "accept the trial court's findings of fact unless they are clearly erroneous." *Burnette*, 184 Ariz. at 304, 90 P.2d at 1089. But even if we were to accept Luz's contention that, contrary to the court's findings, Marc's annual salary was "at least \$57,000," the resulting difference of less than twenty percent does not result in a disparity approaching that which existed in *Burnette* and *Roden*.

¶8 On the question of Marc's reasonableness, the court found that he had not "cooperate[d] in discovery," and that his "testimony regarding finances was not reasonable." However, it did not find that Marc's legal position on the central issue of relocation was unreasonable; in fact, the court stated that Marc had opposed the relocation "in good faith." *See Cummings v. Cummings*, 182 Ariz. 383, 388, 897 P.2d 685, 690 (App. 1994) (declining to award fees where legal question presented for review was reasonable). And, even assuming Luz's characterization of Marc's conduct is accurate, she cites no authority to support her position that a trial court must award fees if a party's behavior crosses a certain threshold of unreasonableness.² Indeed, we are not aware of any Arizona case finding the trial court had abused its discretion by refusing to award attorney fees on the

abuse of discretion where the trial court had refused to award attorney fees despite the fact that one party had "considerably more assets" than the other.

²Luz's reliance on *Sweeney v. Sweeney*, 693 N.W.2d 29, 34 (N.D. 2005) is misplaced, because that case was grounded on a statute that *mandated* an award of attorney fees under specific circumstances.

ground that a party's conduct had been unreasonable. The trial court had the opportunity to observe Marc's conduct and was thus in the best position to determine whether his conduct was so unreasonable as to merit an award of fees under § 25-234, or as a sanction under Rule 65, Ariz. R. Fam. Law P. *See Graville*, 195 Ariz. 119, ¶ 56, 985 P.2d at 616. As noted above, the trial court found "[Marc] was unreasonable on some issues and acted improperly regarding finances, nevertheless, [Marc] was supported in his position by the son, Matthew, and also by the independent evaluator, Dr. Joel Glassman." The trial court did not abuse its discretion in denying Luz's request for attorney fees.³

Custody evaluation

¶9 Luz next argues the trial court should have ordered Marc to pay the entire cost of the custody evaluation. We review the allocation of such expenses for an abuse of discretion. *See In re Marriage of Robinson and Thiel*, 201 Ariz. 328, ¶¶ 5, 19, 35 P.3d 89, 92, 96 (App. 2001).

¶10 At the time the court ordered the custody evaluation it specified, "The evaluator's fee and costs . . . shall be shared by the parties equally," noting that "[t]he parties have agreed at this point to share the cost of the evaluation." Luz does not dispute that she initially agreed to share the cost of the evaluation. And, although she asserts on appeal that she subsequently "requested . . . reimbursement of her contribution to the

³Marc contends that, in any event, the trial court did not have jurisdiction to grant attorney fees because Luz failed to raise the issue until her closing argument. However, we note that Marc did not object at that time, and that he also raised "Attorney's Fees," along with "Relocation of the Minor Child to Costa Rica," "Travel Costs," and "Child Support," as contested issues in his Pretrial Statement.

expense of the custody evaluation,” she fails to support this assertion with any reference to the record. Based on our review of the record, it appears that Luz’s request for reimbursement was made for the first time in her motion for a new trial. And, “[a]n issue raised for the first time after trial is deemed to have been waived.” *Medlin v. Medlin*, 194 Ariz. 306, ¶ 6, 981 P.2d 1087, 1089 (App. 1999). In any event, Luz does not support her argument with any authority and has thus also waived the issue on that basis. *See* Ariz. R. Civ. App. P. 13(a)(6); *see also Brown v. U.S. Fid. & Guar. Co.*, 194 Ariz. 85, ¶ 50, 977 P.2d 807, 815 (App. 1998). The trial court did not abuse its discretion by declining to amend its original ruling to require Marc to pay the entire cost of the evaluation.

Child support

¶11 Luz contends the trial court abused its discretion in denying her request that Marc be required to pay a portion of Matthew’s tuition expenses proportionate to Marc’s income, and in ordering her to pay seventy-five percent of transportation expenses associated with visitation. We review orders that effectively modify an existing child support order for an abuse of discretion. *See In re Marriage of Robinson and Thiel*, 201 Ariz. 328, ¶ 5, 35 P.3d at 92. And, in considering such modifications, courts must apply the Arizona Child Support Guidelines adopted by the Arizona Supreme Court unless their application would

be “inappropriate or unjust.” A.R.S. § 25-320(D).⁴ *See State ex rel. Dep’t of Econ. Sec. v. McEvoy*, 191 Ariz. 350, ¶ 7, 955 P.2d 988, 990 (App. 1998).

¶12 Pursuant to the Child Support Guidelines, a court may increase a parent’s base child support obligation for “reasonable and necessary expenses for attending private or special schools . . . when such expenses are incurred by agreement of both parents or ordered by the court.” A.R.S. § 25-320 app. § 9(B)(2) (2004). Here, there was neither a court order nor an agreement between Luz and Marc pertaining to such expenses. In fact, the trial court found that the issue had not been “discussed at trial.” Furthermore, Luz stated in her response to Marc’s petition and in her accompanying affidavit that in Costa Rica she would “be able to afford private schooling for the child at the most elite private school in the country. . . [and would] bear the entire cost of tuition.”⁵ Because she did not properly raise and support this argument, the trial court did not abuse its discretion in refusing to assign to Marc any responsibility for school tuition. *See Headley v. Headley*, 101 Ariz. 331, 334, 419 P.2d 510, 513 (1966) (appellant may not attack judgment by taking position inconsistent with pleadings); *Winters v. Ariz. Bd. of Educ.*, 207 Ariz. 173, ¶ 13, 83

⁴“The [child support g]uidelines are not substantive law, but function rather as a source of guidance to trial courts in applying the substantive statutory and case law.” *Little v. Little*, 193 Ariz. 518, ¶ 6, 975 P.2d 108, 111 (1999), *citing In re Marriage of Pacific*, 168 Ariz. 460, 815 P.2d 7 (App. 1991).

⁵It was only in her subsequent motion for sanctions that she requested the court to order that Marc should pay “the cost of the child’s private school tuition,” a motion the court denied, finding that such issues were “too important . . . to be decided by default or by sanctions.”

P.3d 1114, 1118 (App. 2004) (argument waived when based on position not raised with specificity and addressed in trial court).

¶13 With respect to the travel expenses, the Child Support Guidelines state that a court may “allocate travel expenses of the child associated with parenting time . . . [and, i]n doing so, . . . shall consider the means of the parents and may consider how their conduct (such as a change of residence) has affected the costs of parenting time.” A.R.S. § 25-320 app. § 18. Matthew’s travel expenses were due solely to Luz’s relocation. Given that the court’s findings do not support Luz’s claim that Marc has “significantly greater financial resources,” the court did not abuse its discretion in considering Luz’s decision to move to Costa Rica and requiring her to pay seventy-five percent of the travel expenses. *See In re Marriage of Robinson and Thiel*, 201 Ariz. 328, ¶¶ 19, 22, 35 P.3d at 96 (finding no abuse of discretion where court ordered mother to pay one-half of visitation travel expenses resulting from her move to Italy, despite fact father had “considerably more assets”).

Disposition

¶14 For the foregoing reasons, we affirm the trial court’s orders denying Luz’s request for attorney fees and for a reallocation of costs, tuition, and travel expenses. In our discretion, we deny both parties’ requests for an award of attorney fees on appeal. *Moedt v. Gen. Motors Corp.*, 204 Ariz. 100, ¶ 23, 60 P.3d 240, 246 (App. 2002). As the prevailing party, Marc is entitled to costs upon compliance with Rule 21, Ariz. R. Civ. App. P.

GARYE L. VÁSQUEZ, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

JOSEPH W. HOWARD, Judge